

In The

**Supreme Court of the United States**

October Term, 1977

No. 77-376

Supreme Court, U. S.  
**FILED**  
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M. J. AK, JR., CLERK

COMMERCE TANKERS CORPORATION and VANTAGE  
STEAMSHIP CORP.,

*Petitioners,*

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

*Respondent.*

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**APPENDIX**

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## APPENDIX A

### Rule 65, Federal Rules of Civil Procedure

#### Rule 65. Injunctions

##### (a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

##### (b) Temporary Restraining Order; Notice; Hearing, Duration.

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed

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forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security.

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

*Appendix A***(d) Form and Scope of Injunction or Restraining Order.**

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

**(e) Employer and Employee; Interpleader; Constitutional Cases.**

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., §2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., §2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

**Rule 65.1, Federal Rules of Civil Procedure****Rule 65.1. Security: Proceedings Against Sureties**

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or

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undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

**APPENDIX B****Norris-LaGuardia Act §7, 29 U.S.C. §107**

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect —

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, associations, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and



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(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: PROVIDED, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said

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complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

### APPENDIX C

In its Brief in Opposition (p. 8-9, n.9), the Union accuses Petitioners of "misstatements" and asserts in effect that the unusual history of the adoption of the NMU restraint-on-transfer clause and the fact that the agreement was entirely "oral" would not have been relevant to the Union's application for a preliminary injunction from Judge Frankel because, the NMU claims, Commerce admitted it was a party to the overall agreement, and Commerce "stipulated" (at trial) that it was bound by that Agreement.\*\*

It is the purpose of this Appendix to set forth that stipulation and relevant excerpts from the trial transcript, consisting largely of attorney colloquy. We reprint them at length and without comment, because in our view, ~~they~~ demonstrate — better than any words Commerce can use — the purposes that an evidentiary hearing before Referee Kheel or Judge Frankel would have fulfilled. Further, they are relevant to an important narrow factual finding by the District Judge, which Commerce claims to be grossly erroneous.\*\*

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\* The admission in the pleading called for proof of the terms of the Agreement and the stipulation relates only to the contract as a matter of contract law and stipulates nothing insofar as antitrust or Taft-Hartley is concerned. (18a, *infra*).

\*\* See p. 31a, *infra*.

*Appendix C***TESTIMONY OF MEL BARISIC, VICE PRESIDENT, NMU**

January 13, 1975

"BY MR. COHEN:

Q. Mr. Barisic, do you know whether or not Commerce Tankers Corporation ever signed an agreement such as Exhibit 13 for identification? A. No, not to my knowledge. That is the job of the research department. I assume they signed.

Q. You assumed? A. Yes.

Q. Have you checked it at any time?

MR. SOVEL: Objection. I think he has answered the question. I think at this point we are reaching a point where he is having argument with the witness.

MR. COHEN: Your Honor, I just started on this.

THE COURT: I will overrule the objection.

Q. At any time have you checked it? A. I just told you.

Q. Is it that you assume it? A. I assume the research department did — has the responsibility.

Q. Do you know whether or not the NMU ever requested the independents, including

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Commerce, in 1969 and 1970 to sign off the blue book? A. Yes, the research department did.

Q. How do you know that, Mr. Barisic? A. Because I know that the research department sent out contracts and agreements like that. It is part of their duty.

Q. And requested people to sign? A. Yes.

Q. And do you know whether Commerce ever signed it? A. I said before, I assume they were sent out to them.

Q. Now on January 7, 1971, when you received the memo from Mr. Spector —

Excuse me, what was Mr. Spector's title on January 7, 1971? A. What?

Q. What was Mr. Spector's title on January 7, 1971? A. He was in charge of our research department.

Q. He head [sic] the head of the research department? A. That is right, and he still is.

Q. Was there any discussion whatsoever between you and Mr. Spector as to whether or not Commerce had ever signed off or been requested to sign off on the blue book? A. Not to my recollection.

Q. None to your recollection? A. Right.

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THE COURT: I do not understand why there is any question —

MR. COHEN: Your Honor, there is no question.

THE COURT: It seems to me that the matter of whether Commerce signed the blue book contract should be beyond any dispute. The question of whether the union sent out specifically or anybody sent out specifically to Commerce for Commerce's signature should be beyond dispute. Maybe it isn't in the stipulation — I don't know.

MR. SOVEL: Your Honor, May I make a statement without being accused of testifying? No one has as yet been able to locate the signed copy. There was testimony —

THE COURT: Any signed copies of that 1969 agreement?

MR. SOVEL: By Commerce — the actual blue book, but there was testimony by Mr. Milton Pilalas in their arbitration proceeding that he had signed it.

THE COURT: Wait a minute. Let us start with the records.

Does the union have the contracts between the union and other people — right?

MR. SOVEL: Yes.

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THE COURT: Doesn't the union have copies of the contracts bearing whatever signatures were made?

MR. SOVEL: On many of the companies, yes, in our files, showing copies signed by the various companies.

THE COURT: And is there a book or document signed by a whole lot of companies, or is there an individual thing signed by the individual company?

MR. SOVEL: Normally my understanding is that there is a file for each company's contract in which they have signed.

THE COURT: Each company having signed.

MR. SOVEL: Yes.

THE COURT: And there is no such document for Commerce — right?

MR. SOVEL: Pardon me — one moment. I want to check.

(Mr. Sovel confers off the record.)

MR. SOVEL: I am advised — I will let Mr. Phillips explain this because he has been doing the work on this.

MR. COHEN: I object, your Honor. I am

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sorry. What is happening now is a dance around a very important issue.

THE COURT: Nobody is dancing.

MR. COHEN: Well, Mr. Sovel is dancing with you. He said maybe Mr. Phillips knows —

MR. SOVEL: I object to that.

MR. COHEN: — and maybe somebody else knows. I have been on this case for four years, your Honor, and there is no signed agreement with Commerce Tankers. If there was, they would have had to produce it pursuant to the subpoena in the depositions, and they did not produce it.

MR. SOVEL: Now your Honor—

MR. COHEN: And there is no request ever went out from the NMU to Commerce Tankers for the blue book.

THE COURT: The only thing is, we are probably wasting more time than saving it.

But you are asking this witness about facts which to me are matters of record — either the union files contain a signed contract by Commerce Tankers or they don't. If the union files do not contain the contract signed by Commerce, I assume none exist, or unless they have had a fire there, and if there is some form of — if there were contracts sent out to companies



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for them to sign, I will assume there was an enclosure letter that there would be copies of those enclosure letters addressed to every company to whom such a request was made.

If that is the case, and if no such enclosure letter or copy thereof is contained for Commerce Tankers, I assume that none ever existed, unless there was a recent fire.

Now these are things that I do not see any reason why we have to have Mr. Barisic on the stand, asking him about it.

MR. PHILLIPS: Your Honor, may I be heard?

THE COURT: Yes.

MR. PHILLIPS: We do not have a blue book, a signed blue book in the union files — period.

THE COURT: For what — for anybody?

MR. PHILLIPS: Just the blue book. No, we don't have it for Commerce.

THE COURT: Okay. But you have it for others?

MR. PHILLIPS: Let me address myself to Commerce. We do have signed memoranda of understanding for various periods of negotiations.



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What happened, your Honor, was that the first portion of the negotiations was completed — that was the economic package that was sent out. We have a signed copy from Commerce as to their agreement with that.

Then other portions of the contract were agreed to. Memoranda was sent out and returned, signed by Commerce.

We do not have any specific blue books signed by Commerce, nor do we have any specific signature by Commerce with respect to artiel [sic] 1, section 2.

THE COURT: Was there a memorandum of understanding relating to that portion of the contract involving article 1, section 2?

MR. PHILLIPS: No, your Honor.

THE COURT: Then there was none sent to anybody?

MR. PHILLIPS: None, no.

THE COURT: Let me just start again.

According to what you say, during the negotiations there were various memos of understanding that were gotten up at different stages.

MR. PHILLIPS: Correct.

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THE COURT: And there was a memorandum of understanding about the economic package.

MR. PHILLIPS: That is correct.

THE COURT: And that was sent out, among other people, to Commerce.

MR. PHILLIPS: Yes, your Honor.

THE COURT: And Commerce signed it.

MR. PHILLIPS: Yes, sir.

THE COURT: And you have a copy of that?

MR. PHILLIPS: Yes, your Honor.

THE COURT: Okay.

Now as far as article 1, section 2 is concerned, at whatever stage of the negotiations that occurred, there was another memorandum of understanding.

MR. PHILLIPS: That is correct, your Honor.

THE COURT: Signed by anybody.

MR. PHILLIPS: Correct, your Honor.

THE COURT: Or presented.

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MR. PHILLIPS: Correct, your Honor.

THE COURT: So the only thing embodying article 1, section 2 was the final blue book.

MR. PHILLIPS: That is correct, your Honor.

THE COURT: Now you have contracts embodying the blue book — the final blue book terms signed by a number of companies.

MR. PHILLIPS: Correct, your Honor.

THE COURT: But not Commerce.

MR. PHILLIPS: That is right. However, as to that, I believe the head of Commerce, the president of Commerce, Mr. Pilalas testified by way of testimony—

THE COURT: But you do not have any documents which you can produce.

MR. PHILLIPS: No.

THE COURT: Okay. Now in the case of any of these companies do you have letters to them or copies of letters asking them to sign the final blue book contract?

MR. PHILLIPS: Yes, your Honor.

THE COURT: Do you have any copy of letters addressed to Commerce?

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MR. PHILLIPS: No, your Honor.

THE COURT: Okay. Well, at least we know what the documentation is.

MR. COHEN: I am sorry, but did you say you had those letters?

THE COURT: They have letters to some companies but not Commerce.

MR. COHEN: Let us establish this correctly.

We have lawyers here talking as if they were witnesses.

Mr. Phillips, is it your understanding that letters were sent out for people to sign the blue book?

MR. PHILLIPS: That is my recollection.

MR. COHEN: Well, I think it would help this case an awful lot if Mr. Sovel and Mr. Phillips would bring those letters to the court tomorrow.

THE WITNESS: What kind of letters are you talking about?

MR. COHEN: The letters requested of the independents to sign off the blue book.

THE COURT: I take it you are requesting production.

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MR. COHEN: Yes.

THE COURT: Okay, you request it."

Record, 412a - 421a

**TESTIMONY OF MR. BARISIC CONTINUED**

Morning, January 14, 1975

"MR. COHEN: Your Honor, there was a request yesterday for the production of certain documents by the NMU. I wonder if they have them with them today. There was a request for the production of the blue book Mr. Phillips represented went out.

MR. SOVEL: I do not have that document with me as yet. I will try to have it this afternoon.

THE COURT: Go ahead.

MR. SOVEL: If your Honor please, may I interject one thing? We will get people to dig out documents, but since in their answer they have admitted the execution of the contract, I fail to see what the issue we are pursuing [sic] with this thing is?

MR. COHEN: Your Honor, I think we are pursuing a very, very clear issue.

We admit the existence of a contract imposed upon us by the NMU having reached agreement with other persons. The fact that

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neither Commerce nor any of the other independents was offered an opportunity to accept or reject the clause is the essence of the antitrust violation that was committed.

THE COURT: Can you answer me this, and I have not looked at the pleadings — I'll look at them right now if you want me to — as a matter of contract law and putting aside for the moment labor law problems or antitrust problems, what is your position as to whether Commerce Tankers was bound by the 1969 collective bargaining agreement with the NMU?

If that's not a fair question, tell me so.

MR. COHEN: I understand your Honor's question. I hesitate to get into the full impact of the issues that arise with respect to both the labor law and the antitrust law but understanding your Honor's question directly relates solely to the contract as a matter of contract law, I feel that once Commerce received the booklet, had knowledge that the NMU intended it be imposed upon it and live under other provisions of the booklet, it became its contract as a matter of fact.

THE COURT: Subject to whatever rights Commerce would have under the Taft-Hartley Act or the antitrust laws, right?

MR. COHEN: Exactly.

THE COURT: All right.

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Then I think that clarifies the nature of the issues Mr. Cohen is pursuing. Those documents I think —

MR. SOVEL: I will get the accurate information on it but it seems to me paragraph 5 of the answer admits the defendants entered into a collective bargaining agreement and respectfully refers the Court to the proof of the terms of the conditions thereof.

THE COURT: That seems to me to be consistent with the answer Mr. Cohen has just given me. I don't think that answer would waive the other questions that Mr. Cohen wants to bring up.

MR. COHEN: I want to say specifically on the record that had I been aware of the specific facts on February 8, 1971, when we were before Arbitrator Kheel, and had I not been led into believing that there was an executed blue book in existence, I certainly would have raised the equitable arguments that arise out of the imposition of a contract without the opportunity of acceptance and rejection of the particular instrument.

THE COURT: I don't think we need to get into that.

MR. SOVEL: I must voice an objection. No one led Mr. Cohen to believe. Mr. Cohen, supposedly a competent lawyer, didn't look at his own documents. I object to him telling me I

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made misrepresentations to the Court. The man wants to come in and say I am incompetent and at fault, that is an outrageous situation for any lawyer to have to put up with.

THE COURT: Let me try to put it in a little softer manner.

I think as of the time of the arbitration no lawyer would have gone into the matter with the immense depth with which the matter has been gone into by this time, so, in other words, a lawyer might thing [sic] as this litigation went on a lot more than he would think of immediately before Arbitrator Kheel. That's about all you are saying and I think that's a natural thing.

Let's go on."

Record 455a-458a

**CROSS-EXAMINATION OF MR. BARISIC**

Afternoon, January 14, 1975

"MR. KLEIN: I believe Mr. Sovel undertook to provide us this afternoon copies of certain letters sent to the independent companies pursuant to Mr. Cohen's request.

MR. SOVEL: I don't know that I undertook to do it this afternoon. We have not been back to the office, since we had lunch in the same restaurant.



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MR. KLEIN: Your Honor —

MR. SOVEL: I thought the question of relevancy was determined. I will get whatever we have got.

THE COURT: You said you would produce all of that material and I thought this morning you said you would produce it this afternoon. It is not here. We will have to work around that.

They don't have it here.

When can you have it here?

MR. SOVEL: Very definitely tomorrow morning.

THE COURT: All right, tomorrow morning.

Let's go on to something else."

Record 487a

**TESTIMONY OF EDWARD SILVER, CHIEF  
NEGOTIATOR FOR MARITIME EMPLOYEES  
ASSOCIATIONS**

January 15, 1975

"Q. Did you ever sign a copy of the blue book? A. I don't believe so.

Q. Do you know whether any of your

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constituents, the members of the Tanker Service Committee, have executed the blue book? A. I don't know whether they have signed the blue book, no.

Q. Directing your attention now to Article I, Section 2 of the blue book, are you familiar with that section? A. Yes, I am.

Q. Did you ever sign a memorandum of understanding with the National Maritime Union on behalf of either the MSC or TSC incorporating the provisions of Article I, Section 2? A. Not myself, no.

Q. Did anyone else? A. It could be that my partner, Mr. Oppenheimer did.

MR. COHEN: I have never seen any such document, Mr. Sovel. I request you produce it.

Q. Article I, Section 2 is called the sale and transfer clause or the restrain on transfer clause. A. Called the sale on transfer clause.

MR. SOVEL: If your Honor please, in response to Mr. Cohen's last statement I am advised we have no such document.

THE COURT: Does that mean there was no such document signed?

MR. SOVEL: It does not mean that. It means when the blue book was printed up the underlying documents were destroyed.

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MR. COHEN: I object to that.

THE COURT: You don't have anything in the memos of understanding?

MR. SOVEL: I am only answering a question that was directed to me.

THE COURT: It is a matter of record.

MR. SOVEL: The documents, as I understand it, they drafted after the blue book was printed up Mr. Oppenheimer, Mr. Phillips, there was a proofreading session and when they were done the blue book came into effect and the memos which were the initial documents which they had were discarded.

We do not have them. Maybe Mr. Oppenheimer does. I don't.

THE COURT: Let's go ahead. Develop the evidence.

MR. SOVEL: Excuse me. As I understand, they were kept over a year and we do not have them now.

THE COURT: You develop the evidence.

MR. COHEN: I must say on the record that I would object to any use of the representations that are being made now as evidence in this case and I believe —

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THE COURT: Unless something is stipulated, I won't accept it.

MR. COHEN: Thank you.

THE COURT: I think we do have a concession which is binding on the union, that they have no copies of any such memo.

MR. SOVEL: At this time.

Excuse me. One minute. I want to check with the people who may have more direct knowledge of this than I do.

THE COURT: All right.

(Pause.)

MR. SOVEL: If your Honor please, Mr. Spector wants to try to give you a final, complete, binding answer on that. He wants to check certain files he may have in his office to report back on that to see if there is any additional documents that might relate to this.

THE COURT: I cannot believe that the union does not know categorically whether or not there was a memorandum of understanding executed covering Article 1, Section 2.

You find that out and find out if it ever existed or if it still exists. You will report to us."

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**TESTIMONY OF EUGENE SPECTOR, RESEARCH  
DIRECTOR, NMU**

January 20, 1975

"Q. As of January, 1971, had any company in the maritime industry acknowledged in writing a willingness to comply with Article I, Section 2 of the NMU collective bargaining agreement?

MR. SOVEL: Objection, your Honor, and we are back to something that we had a lot of business on at the beginning of the trial, Commerce had been [sic] admitted being a party to the collective bargaining agreement. I don't see what this has to do with the agreement in view of the collective bargaining situation.

THE COURT: I will overrule that objection. I am puzzled by your question. You asked if 'any company' in the industry had acknowledge [sic] in writing, what?

MR. COHEN: A willingness to comply with Article I, Section 2, sale and transfer clause of the NMU —

THE COURT: Didn't Mr. Silver sign on behalf of the TSC?

MR. COHEN: His testimony was that he did not, but he was sure somebody had. At that time I requested production of any agreements where anybody had, and we got into —

THE COURT: Let's just get it in a little

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more simple context. If your question is whether anybody signed the agreement embodying the blue book, that's a simple question.

Did anybody sign this thing?

THE WITNESS: What date, your Honor?

Q. January, 1971, Mr. Spector. A. No, sir.

Q. Isn't it a fact, Mr. Spector, that nobody was asked to sign this agreement until after the Article I, Section 2 clause was upheld as valid by the trial examiner?

MR. SOVEL: Objection, your Honor.

THE COURT: Wait a minute. Are you telling me that nobody signed the blue book?

THE WITNESS: Your Honor, if you wanted the chronology of what happened —

THE COURT: I am not asking about a chronology. I thought you told me a minute ago that nobody signed the blue book.

THE WITNESS: At that point in time.

THE COURT: I want to see if I am hearing correctly.

THE WITNESS: That's correct, sir. As of that point in time.

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THE COURT: What time?

THE WITNESS: January 1971.

THE COURT: Next question.

Q. Isn't it a fact, Mr. Spector, that no one was asked to sign the blue book at any time prior to January of 1971? A. That's correct, sir.

Q. And that's also true as to the green book which covers the dry cargo carriers? A. I believe that's correct, sir.

Q. And isn't it a fact, Mr. Spector, that in September of 1971, requests were made of the tanker and dry cargos to sign off on the blue book and green book? A. Yes, my office sent out letters.

Q. And that was the first time it was ever done? A. That's correct.

Q. Was the blue book sent at that time to Commerce Tanker Corporation? A. It was.

Q. It was? A. Yes, sir.

Q. Was it returned? A. It was not returned."

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**TESTIMONY OF MR. SPECTOR CONTINUED**

Later January 20, 1975

**"THE COURT:** What I am not clear about is your formalities. It would seem to me just at first blush if you are going to have a contract with somebody, you get them to sign it.

**THE WITNESS:** Every signatory company to an NMU tanker or dry cargo agreement, signed that basic agreement, '61 agreement, as amended in '63. Subsequent arbitration clause and subsequent arbitration awards and subsequent memorandums of understanding which amended that agreement, so that we had a book, a contract package which was about that thick (indicating) by 1968.

**THE COURT:** Containing the contract documents?

**THE WITNESS:** Yes, the basic agreement and amends to that basic agreement.

**THE COURT:** In other words, you had the signatures of very [sic] company that you said had a collective bargaining agreement with the NMU?

**THE WITNESS:** That's correct, sir.

**THE COURT:** Now, you didn't do that for the '69 negotiated contracts?

**THE WITNESS:** Yes, sir.



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THE COURT: Why didn't you do it?

THE WITNESS: That was my fault. That was the first collective bargaining agreement negotiated with myself as research director, and I was asked, when the contract was concluded, to put it in shape, make a table of contents, and to rearrange the subject matter in a more logical sequence, which I did.

It was then sent to the printers. The printers sent it back to my office, and I distributed it to the companies, to the union, had it put aboard the vessels, but did not know that it was my responsibility to send it out for signature, and somewhere along the line, it was brought to my attention, we do not have signed agreements on the blue book.

THE COURT: When was that brought to your attention?

THE WITNESS: It was brought to my attention around August or early September of '71. I said, 'Well, I didn't know I was supposed to do this.'

THE COURT: Who brought that to your attention?

THE WITNESS: I don't recall how it arose. It probably resulted in terms of Mr. Barisic asked me a question of our general counse, [sic] and a check of the contract files showed that we had the memorandum of understanding and we had the blue books but we had no signed agreements.

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They said 'Send them out and get them signed.'

And I sent them out in September, I think it was September 7th and then for those companies that did not return them, I followed up with a second letter and sometimes a third letter, and eventually, by the end of '71, or early '72, we had signed agreements from all companies.

THE COURT: But you didn't get one from Commerce?

THE WITNESS: No. Commerce did not send one.

THE COURT: Okay. Go ahead.

BY MR. COHEN:

Q. Did Mr. Phillips tell you about the lack of a signed blue book from Commerce in early '71? A. He might have. I don't recall.

Q. Didn't he tell you that was a problem in connection with the arbitration? A. He asked for the Commerce Tanker file and I provided him with that file. As to any discussions we had about it, I do [sic] do not recall any discussions along those lines. I did not participate in the arbitration and did not keep myself abreast of what was happening in that respect."

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District Judge Griesa found that the NMU's failure to request the companies to sign the final agreement or any memorandum indicating their assent to it was "due to an oversight by NMU personnel." (Pet. 45a-46a).<sup>\*</sup> Commerce contends that this finding is grossly erroneous, and that it may, and can be corrected by this Court on review.

To believe that the NMU personnel committed an "oversight," it is necessary to deal with the following facts:

(1) The maritime unions initially proposed to the MSC and TSC that agreement to this clause was the number 1 condition for commencement of negotiations (Record, E68).

(2) There is a total void of documentary or credible testimonial evidence to demonstrate that the clause or its complex ramifications was openly discussed by the NMU with anyone other than Mr. Silver.

(3) The Union carefully obtained the signature of all the independent employers to the most miniscule of other terms, only neglecting "restraint-on-transfer."

(4) The Union also omitted to get Mr. Silver's signature to this clause.

(5) In February of 1970, the NMU circulated a printed book version of its new contract to all employers. These books contained Article 1, Section 2. At the time they were distributed, no accompanying letter was sent out, no request for signature of

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<sup>\*</sup> A far more rational explanation for the Union's conduct is, Commerce contends, that it realized even then that the clause was unlawful under Section 8(e), and that any "request" to the companies to sign off on the clause might constitute a violation of §8(b)(4) and result in a testing of the validity and the Union's exposure to monetary damages under 303 of the LMRA.

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the employers was made, and no form of acquiescence by Commerce or any company was asked for or received.

In his decision of preliminary injunction, Judge Frankel found: Commerce, "Along with others in the shipping industry, has had 20 months or so in which to seek the Labor Board's authoritative judgment as to whether the disputed provision of the June, 1969 agreement is unlawful." In fact, however, neither Commerce nor anyone else in the shipping industry could make any complaint until they had been requested to agree to the clause, or it was otherwise enforced. As of January of 1971, when the NMU commenced its enforcement of the Restraint-on-Transfer clause against Commerce, not a single employer in the industry had agreed, or even been requested to agree, to the clause.

Thus, the emergency that arose with the Vessel BARBARA was not a mere accident. It was inevitable that someone would make the mistake of trying to sell an NMU ship to an SIU-contracted company. Once that was to happen — notwithstanding whether the illegal undertaking was excluded or included in the contract of sale — the transaction would have been frustrated by the inevitable conflict between the fleetwide doctrine and the restraint-on-transfer provisions.

